No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of approximately 1.6 million members dedicated to the principles of liberty and equality embedded in the United States Constitution. In the nearly 100 years since its founding, the ACLU has appeared in myriad cases before this Court, both as merits counsel and as an *amicus curiae*, to defend constitutional rights. This includes numerous cases in which the ACLU has urged this Court to ensure that the criminal justice system is administered in accordance with constitutional principles, such as *Mapp v. Ohio*, 367 U.S. 643 (1961); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Terry v. Ohio*, 392 U.S. 1 (1968); *Furman v. Georgia*, 408 U.S. 238 (1972); and *City of Chicago v. Morales*, 527 U.S. 41 (1999).

Because this case involves a substantial question bearing on the constitutional administration of the criminal justice system, its proper resolution is a matter of significant concern to the ACLU and its members.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and their indications of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

This case asks whether Congress can constitutionally delegate to the Attorney General, the nation's chief prosecutor, both unfettered authority to impose a criminal prohibition in the first place and the power to prosecute violations of the prohibition he has imposed. To do so, as Congress has done here, violates the separation of powers, as reflected in the nondelegation doctrine.

The Framers of our Constitution—all too aware of the threats posed by concentrated power—chose to divide authority among three independent branches of government. That design, this Court has repeatedly emphasized, "serves not only to make Government accountable but also to secure individual liberty." *Boumediene v. Bush*, 553 U.S. 723, 742 (2008).

The Framers assigned the authority to make law to Congress, while giving to the executive branch the power to enforce and apply the law. If Congress delegates its lawmaking authority to the executive branch without sufficient guidance, it violates the nondelegation doctrine. The Court has recognized, however, that the complexity and scope of a national government requires that Congress have leeway to delegate broadly in the administrative setting to agencies that have the expertise, experience, and bandwidth to translate general policies into detailed rules. Thus, so long as Congress provides an "intelligible principle" to guide administrative agencies, the nondelegation doctrine is satisfied. No other approach is practicable or constitutionally required.

But all delegations are not created equal. The same deferential approach is not appropriate when Congress delegates authority to the Attorney General to make criminal law. In the civil administrative setting, for example, this Court has deemed a delegation to the Federal Communications Commission to regulate the airwaves "in the public interest" a sufficiently "intelligible principle." *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943). But it is inconceivable that Congress could authorize the Attorney General to adopt rules defining criminal conduct "in the public interest." The "intelligible principle" requirement must be applied in a more exacting way when the Attorney General, the nation's prosecutor, is delegated authority to define criminal conduct.

This conclusion is supported by the special solicitude the Constitution shows toward restrictions on the criminal power more generally. The Framers' concern with the threats to liberty associated with criminal punishment was a key motivation in their adoption of divided government. *See The Federalist* No. 47, p. 303 (C. Rossiter ed. 1961) (James Madison) ("'When the legislative and executive powers are united in the same person or body,' says [Montesquieu], 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.'"); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1011-20 (2006) (noting that the Framers understood the crucial liberty-protecting function of the separation of powers and that, "in the context of criminal law, no other mechanism provides a substitute," *id.* at 1031).

The power to punish is constitutionally distinctive. This fact is reflected in the many guarantees of the Fourth, Fifth, Sixth, and Eighth Amendments that restrict governmental power either only or with greater force in criminal cases. It is reflected in a range of basic doctrines, from the rule of lenity to the void-for-vagueness principle. And it is manifest in the constitutional prohibitions on *ex post facto* laws and bills of attainder.

In order to harmonize the nondelegation doctrine with the Court's constitutional criminal jurisprudence, therefore, the Court should make clear that, like the guarantees of the Fourth, Fifth, Sixth, and Eighth Amendments, the rule of lenity, and the void-for-vagueness doctrine, among others, nondelegation principles demand more stringent application in criminal settings—particularly where, as here, the same official is delegated the power to determine *whether* criminal law should apply and to prosecute violators of that law.

The Sex Offender Registration and Notification Act (SORNA) fails the heightened nondelegation requirements applicable in the criminal setting. SORNA authorizes the Attorney General to determine whether and how the statute's registration requirements, backed by criminal sanctions, apply to sex offenders convicted before the statute was enacted, and to prosecute those who fail to abide by the obligations the Attorney General has imposed. 34 U.S.C. § 20913(d). And it does so without providing meaningful guidance as to how the Attorney General should exercise that delegated authority. As the government has conceded, the Attorney General could impose criminally enforced

requirements on all, some, or none of those previously convicted, and the statute offers no direction as to how to choose between the options.

SORNA's open-ended delegation to the Attorney General of the power to decide whether conduct is, or is not, a crime and to prosecute those who violate the law is a potent threat to liberty. Without much clearer guidance from Congress, such a delegation is unconstitutional.

ARGUMENT

I. SPECIAL NONDELEGATION CONCERNS ARE RAISED WHERE CONGRESS DELEGATES TO THE ATTORNEY GENERAL, THE NATION'S PROSECUTOR, UNGUIDED DISCRETION TO DEFINE WHETHER CRIMINAL LAW APPLIES IN THE FIRST PLACE.

The nondelegation doctrine serves the separation of powers by requiring Congress to provide an "intelligible principle" to guide administrative rulemaking and regulation. At the same time, the Court has acknowledged that substantial delegation is necessary in the modern administrative state, and has therefore rarely invalidated statutes on this ground. But where Congress seeks to delegate criminal lawmaking authority to the Attorney General, the nation's chief prosecutor, concerns for liberty are heightened, and the justifications for a broad approach to delegation to administrative agencies are generally inapplicable. Thus, the nondelegation doctrine should require greater precision where, as here,

Congress seeks to authorize the Attorney General to impose criminal prohibitions in the first place.

A. Broad Delegation is Generally Permissible in the Administrative Setting, So Long As Congress Provides an Intelligible Principle.

"Even before the birth of this country, separation of powers was known to be a defense against tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996). That is why "[t]his Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). As Justice Jackson reminded us, "the Constitution diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Rooted in the principle of separation of powers, the nondelegation doctrine has long "mandate[d] that Congress generally cannot delegate its legislative power to another Branch." *Mistretta*, 488 U.S. at 372; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). "Legislative power, as distinguished

from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions." *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (citation and internal quotation marks omitted); *see also United States v. Evans*, 333 U.S. 483, 486 (1948) ("[D]efining crimes and fixing penalties are legislative . . . functions.").

The Court has recognized, however, that the nondelegation doctrine does not prevent Congress from legislating broadly and delegating significant policy judgment to executive rulemaking in the administrative context. In the administrative setting, as long as Congress lays down "an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform," no nondelegation problem exists. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also Mistretta*, 488 U.S. at 372-73 (the doctrine is satisfied when a statute "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority" (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

In the ninety years since this Court first articulated the "intelligible principle" requirement, it has broadly construed Congress's ability to delegate power in the administrative sphere, striking down only two statutes on nondelegation grounds. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

In the administrative setting, the Court has accepted as sufficiently ascertainable broad standards such as "in the public interest." *See Nat'l Broad. Co.*, 319 U.S. at 225-26 (upholding statute authorizing the FCC to regulate broadcast licensing "in the public interest"); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24-25 (1932) (upholding the Transportation Act's empowerment of the Interstate Commerce Commission to authorize acquisition of one carrier by another if in the "public interest"); *see also Lichter v. United States*, 334 U.S. 742, 774-86 (1948) (upholding statute granting authority to recover "excessive profits" earned on military contracts).

"The judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems." *Am. Power & Light Co.*, 329 U.S. at 105. The Court has acknowledged that broad administrative delegations are both necessary and inevitable:

> The legislative process would frequently bog down if Congress were constitutionally required to appraise before-hand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency

> which is to apply it, and the boundaries of this delegated authority.

Id. In the administrative setting, the Court has warned, "if Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription [of the intelligible principle standard,] . . . the burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940).

Broad delegation in the administrative domain serves to promote democracy, accountability, and public responsiveness. Jerry L. Mashaw, *Greed, Chaos, and Governance* 152-56 (1997); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. Econ. & Org. 81, 95-99 (1981); *see also* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 Geo. L.J. 97, 131-42 (2000); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L. Rev. 775, 781-82 (1999). The nondelegation doctrine thus does not—and should not—prohibit a robust administrative state.

B. The Nondelegaton Doctrine Demands More Specific Legislative Guidance in the Criminal Context.

All delegations, however, are not created equal. Heightened concerns are raised in the criminal context when prosecutors acquire the power to both make and prosecute the criminal law. Moreover, the justifications for broad delegation in

the administrative setting are generally inapplicable to the criminal domain.

The power to define crimes is constitutionally distinctive. The Constitution recognizes its special nature throughout and attaches numerous special restrictions to the exercise of criminal powers.

1. The Constitution expressly prohibits the passage of *ex post facto* laws and bills of attainder. *See* U.S. Const. art. I, §§ 9 & 10. Both prohibitions applied to the States at a time when the Constitution generally applied its individual liberty protections only to the federal government. *See* U.S. Const. art. I, § 10. Like the nondelegation doctrine, the Bill of Attainder Clause reinforces separation-of-powers principles: "The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended . . . as an implementation of the separation of powers . . . ." *United States v. Brown*, 381 U.S. 437, 442 (1965); *see also Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 468 (1977) (a bill of attainder "legislatively determines guilt and inflicts punishment"). "The linking of bills of attainder and ex post facto laws," in Article I, sections 9 and 10 of the Constitution, "is explained by the fact that a legislative denunciation and condemnation of an individual often acted to impose retroactive punishment." *Nixon*, 433 U.S. at 468 n.30. As Alexander Hamilton observed, "[t]he creation of crimes after the commission of the fact . . . and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." *The Federalist* No. 84, p. 511-12 (C. Rossiter ed. 1961).

2. Four of the first ten amendments address criminal process. Virtually all of the numerous guarantees of the Fourth, Fifth, Sixth, and Eighth Amendments restrict government power either exclusively or with greater force in criminal cases.

a. The Fourth Amendment, for example, requires the exclusionary rule only in criminal cases. *Compare Mapp*, 367 U.S. 643 (applying the exclusionary rule to a criminal trial), *with United States v. Janis*, 428 U.S. 433 (1976) (declining to extend the exclusionary rule to a civil tax proceeding), *and INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040-50 (1984) (declining to apply the exclusionary rule to civil deportation hearings). Similarly, the administrative search exception to the Fourth Amendment recognizes that where a government search serves "special needs, *beyond the normal need for law enforcement*," the warrant and probable cause requirements need not apply. *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)) (emphasis added). By contrast, where ordinary criminal law enforcement is involved, those requirements presumptively govern. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

b. The Fifth Amendment's due process guarantee demands a higher standard of proof in criminal cases—namely, proof beyond a reasonable doubt—than the preponderance standard generally sufficient in the civil context. *Compare In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against

conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."), *with United States v. Regan*, 232 U.S. 37, 47-48 (1914) (civil cases generally require proof under preponderance standard), *and Addington v. Texas*, 441 U.S. 418, 427-31 (1979) (reasonable doubt standard not applicable in civil commitment proceeding).

c. The Sixth and Fourteenth Amendments guarantee a jury trial in non-petty criminal cases in federal and state courts. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"); *Duncan v. Louisiana*, 391 U.S. 145 (1968). Article III likewise guarantees a jury trial in criminal but not civil cases. U.S. Const. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"). The Sixth Amendment also provides a set of additional rights to criminal defendants: a speedy and public trial, notice of criminal charges, confrontation, and assistance of counsel. U.S. Const. amend. VI. By contrast, in civil cases, the Seventh Amendment provides a more limited guarantee of jury trial, and none of the Sixth Amendment's other criminal trial rights. U.S. Const. amend. VII; *see also Walker v. Sauvinet*, 92 U.S. (2 Otto) 90 (1875).

d. The Eighth Amendment limits the power of the legislature to punish by forbidding the imposition of excessive bail or cruel and unusual punishments. U.S. Const. amend. VIII; *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

3. The exceptional nature of the power to define crimes is likewise reflected in the rule of lenity, which directs courts to construe ambiguity in criminal statutes in favor of the defendant. *See Cleveland v. United States*, 531 U.S. 12, 25 (2000); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Bell v. United States*, 349 U.S. 81, 83-84 (1955). The rule of lenity, which does not apply in the civil setting, reinforces the separation of powers: "Application of the rule of lenity . . . strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

4. The heightened demands of the void-for-vagueness doctrine in the criminal arena also underscore the distinctive character of criminal law, and the more stringent requirements of the separation of powers in that realm. *See Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015); *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (noting that the Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe"). As this Court recently explained, the void-for-vagueness doctrine "is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (opinion of Kagan, J. for a plurality of the Court with Gorsuch, J. concurring in part and concurring in judgment). This doctrine ensures that the legislature, not prosecutors or courts, determine

the scope of the criminal law. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . ."); *see also Kolender*, 461 U.S. at 358 n.7 ("[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained . . . [this would] substitute the judicial for the legislative department of government." (citation and internal quotation marks omitted)).

5. That the separation of powers places sharper limits on executive rulemaking in the criminal sphere is also reflected in this Court's jurisprudence under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court routinely extends *Chevron* deference to executive branch agencies in the administrative context. But it has not applied that doctrine to executive branch interpretations of criminal statutes. *See United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."); *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). That decision, too, underscores the Constitution's special commitment of the power to define crimes to Congress, not the executive branch.

6. This Court has also more generally required stringent division of the separation of powers in the criminal arena. *See, e.g., United States v. Bass*, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because

criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."); *Brown*, 381 U.S. at 442 (constitutional prohibition against bills of attainder reinforces prohibition on trial by legislature); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812) (federal courts have no authority to exercise common law jurisdiction in criminal cases).

Moreover, the justifications for the liberal "intelligible principle" standard for administrative action are generally inapplicable in the criminal context. *See* Barkow, *supra*, at 989-97, 1011-34 (contrasting justifications for delegations in administrative and criminal domains). No vast or complex set of questions necessitating agency flexibility attends, for example, the yes-or-no decision of whether to apply SORNA to prior offenders—unlike, for example, the myriad issues raised in complex regulatory arenas from securities to environmental to electricity regulation. Instead, a basic judgment about balancing liberty and safety is paramount: the sort of judgment the Framers directed the legislature to make.

To harmonize the nondelegation doctrine with all of the above rules, the "intelligible principle" standard should be applied in more exacting fashion where, as here, a prosecutor is afforded discretion to determine whether criminally backed obligations will be imposed on particular persons or conduct. It would be constitutionally unfathomable for a statute to delegate to the Attorney General the power to impose criminal prohibitions "in the public interest" in the open-ended manner this Court has permitted

with regard to the delegation of civil administrative powers. *See, e.g., N.Y. Cent. Sec. Corp.*, 287 U.S. at 24-25; *Nat'l Broad. Co.*, 319 U.S. at 225-26. *Cf. United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (a statute criminalizing "acts detrimental to the public interest" would be void for vagueness).[2]

In sum, separation-of-powers principles have special purchase in the context of the criminal law, where unique deprivations of life and liberty are at stake. This Court previously reserved the question of whether, in keeping with these principles, the nondelegation doctrine requires greater specificity in the criminal context. *Touby v. United States*, 500 U.S. 160, 165-66 (1991) (comparing *Fahey v. Mallonee*, 332 U.S. 245, 249-50 (1947), with *Yakus v. United States*, 321 U.S. 414, 423-27 (1944), and *United States v. Grimaud*, 220 U.S. 506, 518, 521 (1911)). It should now bring the nondelegation doctrine into line with the numerous other constitutional protections and doctrines that apply with special force in the criminal context and make clear that the nondelegation doctrine requires more precise legislative guidance in the criminal arena.

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[2] The requirement of greater clarity in the criminal context should apply with even greater force where, as here, Congress authorizes the Attorney General to impose retroactive obligations on individuals for conduct that occurred before the statute was enacted.

II. SORNA'S DELEGATION TO THE ATTORNEY GENERAL TO DECIDE WHO IS RETROACTIVELY SUBJECT TO ITS CRIMINAL OBLIGATIONS VIOLATES THE NONDELEGATION DOCTRINE.

SORNA authorizes the Attorney General to impose criminally backed obligations retroactively on sex offenders, without adequate guidance as to how he is to decide who should be covered, to what extent they should be covered, or for how long they should be covered. Over the years, the Attorney General has on several occasions changed the scope of SORNA's retroactive application—without any guidance or direction from Congress. Because the Attorney General also prosecutes those who violate SORNA's prescriptions, this open-ended delegation raises heightened separation-of-powers concerns—and therefore requires that Congress provide clear guidance to inform and channel the Attorney General's application of the law. Yet SORNA provides little or no guidance, and therefore violates the heightened demands of the nondelegation doctrine in the criminal sphere.

SORNA provides that anyone required to register under the Act who knowingly fails to do so, or who fails to update his or her registration after traveling in foreign or interstate commerce, is guilty of a federal crime. 18 U.S.C. § 2250(a). Congress provided that these obligations would apply to all persons convicted of a sex offense *after* the law was enacted. But Congress could not agree on whether and to what extent the law should apply retroactively, so it punted on that question, and left its resolution to the Attorney General. *See* 34 U.S.C.

§ 20913(d). The Act states: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction . . . ." *Id.*

In doing so, Congress delegated a core legislative judgment—who is subject to criminally backed obligations—to the Attorney General, who is simultaneously responsible for prosecuting violations of SORNA's registration requirements.[3] As this Court has noted, subsection (d) is "naturally read as conferring the authority to *apply* the Act." *Reynolds v. United States*, 565 U.S. 432, 440 (2012); *id.* at 445. But Congress failed to satisfy the heightened demands of the nondelegation doctrine in the criminal context.

As then-Judge Gorsuch has noted, "[i]f the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce." *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc). Yet, he continued, "that's precisely the arrangement [SORNA] purports to allow in this case and a great many more like it." *Id.*

Amicus does not address whether SORNA would satisfy the forgiving "intelligible principle" standard applicable in the administrative context. Nor need this Court do so. Whether SORNA would

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[3] 28 U.S.C. § 547 provides that the United States Attorneys, who serve at the direction of the United States Attorney General, shall prosecute all offenses against the United States, except as otherwise provided by law.

provide sufficient guidance for a purely administrative scheme with no criminal consequences, it plainly does not satisfy the more exacting standard that appropriately governs delegation of lawmaking authority to the Attorney General in a criminal context. SORNA provides no guidance whatsoever to the Attorney General in deciding whether its criminally backed registration requirements should apply to prior offenders—nor any standards by which this Court could ascertain whether in doing so he had obeyed the will of Congress.

With regard to *future* offenders, SORNA provides an extraordinary level of detail. It creates three tiers of offenders, based on the seriousness of the offense, and specifies which offenses fall into each. 34 U.S.C. § 20911. It specifies in detail what information those offenders must provide for inclusion in the sex offender registry. *Id.* § 20914(a). It sets the period of time offenders in each tier must register: 15 years for tier I offenders, 25 years for tier II offenders, and life for tier III offenders. *Id.* § 20915(a). The statute then provides, in detail, what sorts of conditions merit a reduction in the full registration period for tiers I and III, including successfully completing a period of probation or a sex offender treatment program. *Id.* § 20915(b). And it specifies the number of years that a clean record must be maintained and the amount that the full registration period shall be reduced in each circumstance. *Id.*

By contrast, Congress made no decisions about the applicability of the Act to *prior* offenders, and instead simply delegated that decision entirely to the

Attorney General. Under this broad delegation, the Attorney General is free to do nearly anything he chooses with respect to the more than 500,000 prior offenders—from subjecting all of them to the Act in full to, as the government has conceded, applying the Act to none of them. *See* Br. for the United States at 23-24, *Reynolds*, 565 U.S. 432 (SORNA "does not require [the Attorney General] to act at all."). He might also choose to apply *some* of the Act's requirements to *some* previous sex offenders. But the Act provides no principles to guide the Attorney General in making that decision.

As then-Judge Gorsuch wrote:

> Without any discernible principle to guide him or her in the statute, the Attorney General could, willy nilly, a) require every single one of the estimated half million sex offenders in the nation to register under SORNA, b) through inaction, leave each of those half million offenders exempt from SORNA, c) do anything in between those two extremes, or d) change his or her mind on this question, making the statute variously prospective and retroactive, as administrative agencies are normally entitled to do when Congress delegates interpretive questions to them.

United States v. Hinckley, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring), *abrogated by Reynolds*, 565 U.S. 432; *see also, e.g.*, *United States v. Rickett*, 535 Fed. App'x 668, 673 (10th Cir. 2013) ("As written, [subsection (d)] gives the Attorney General

discretion to decide whether and how SORNA should be applied retroactively."); *United States v. Madera*, 528 F.3d 852, 858 (11th Cir. 2008) (noting the Attorney General's "unfettered discretion to determine both *how* and *whether* SORNA was to be retroactively applied").

The lack of guidance provided in SORNA stands in stark contrast to the Controlled Substances Act, the only other statute this Court has reviewed under the nondelegation doctrine that delegated the power to impose a criminal prohibition to the Attorney General. *See Touby*, 500 U.S. at 162-68. That statute, like this one, authorized the Attorney General to decide the scope of criminally backed obligations, but it did so with markedly more statutory guidance.

The *Touby* Court explained that the Controlled Substances Act required the Attorney General, before scheduling a drug temporarily, to find that doing so is "necessary to avoid an imminent hazard to the public safety." 21 U.S.C. § 811(h)(1). In making that determination, it further required him to consider three factors: the drug's "history and current pattern of abuse"; "[t]he scope, duration, and significance of abuse"; and "[w]hat, if any, risk there is to the public health." 21 U.S.C. §§ 811(c)(4)-(6), 811(h)(3). Included within those factors were three *additional* statutorily prescribed considerations: "actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." 21 U.S.C. § 811(h)(3). The Act also required the Attorney General to publish a 30-day notice of the proposed scheduling in the Federal Register, transmit the notice to the

Secretary of HHS, and "take into consideration any comments submitted by the Secretary in response." 21 U.S.C. §§ 811(h)(1), 811(h)(4).

"In addition to satisfying the numerous requirements of [§ 811(h)]" noted above, the Attorney General must "find that [the drug] 'has a high potential for abuse,' that it 'has no currently accepted medical use in treatment in the United States,' and that '[t]here is a lack of accepted safety for use of the drug . . . under medical supervision.'" *Touby*, 500 U.S. at 167 (quoting 21 U.S.C. § 812(b)(1)). The level of detail the Court thus found sufficient in *Touby* is worlds apart from the broad principles it has deemed sufficiently "intelligible" in administrative cases. *See, e.g., N.Y. Cent. Sec. Corp.*, 287 U.S. at 24-25. SORNA contains nothing even arguably akin to the Controlled Substances Act's level of detail or guidance.[4]

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[4] The Court has occasionally upheld delegations to administrative agencies to impose rules to which criminal sanctions attached, but none of these cases involved delegations to the Attorney General. *See Yakus*, 321 U.S. 414; *Grimaud*, 220 U.S. 506; *Mistretta*, 488 U.S. 361.

Each of these cases, moreover, involved the implementation of detailed administrative schemes—concerning, respectively, an emergency wartime measure allowing the agency to set maximum prices of commodities and rents, *Yakus*, 321 U.S. 414; *id.* at 448-51 (J. Roberts, dissenting), a statute delegating authority to regulate the maintenance of forest reservations and attendant economic activity, *Grimaud*, 220 U.S. at 515-16; and a provision empowering the U.S. Sentencing Commission to promulgate sentencing guidelines, *Mistretta*, 488 U.S. at 371-80. No party argued in these cases that the nondelegation doctrine demanded more precise legislative guidance because of the criminal sanction.

The government has suggested that SORNA provides an "intelligible principle" in its preamble, which provides that the statute's purpose is to create a "comprehensive national system" for registration and to "protect the public from sex offenders and offenders against children." 34 U.S.C. § 20901; *see* Br. of the United States in Opp'n 23-24. But even assuming arguendo that such broad purpose language might satisfy the demands of the nondelegation doctrine in a purely civil administrative setting, it is manifestly insufficient where, as here, Congress has delegated the power to make criminal law to the nation's prosecutor. This language offers no guiding principle as to how the Attorney General should exercise his delegated authority. As noted above, the government has conceded that the Attorney General could do anything from applying the Act retroactively in full to not applying it retroactively to anyone, and

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Each of these cases also involved "precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate." *Mistretta*, 488 U.S at 379; *see also Yakus*, 321 U.S. at 425-26 ("[I]t is irrelevant that Congress might itself have prescribed the maximum prices . . . . [Congress] is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards."); *Grimaud*, 220 U.S. at 516 ("What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another. In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management."). By contrast, deciding whether to apply the SORNA registration requirements to prior sex offenders involves a simple legislative judgment, not an "intricate, labor-intensive task" calling for "delegation to an expert body."

presumably to anything in between. *See* Br. for the United States at 23-24, *Reynolds*, 565 U.S. 432; Oral Arg. Tr. 31:15-16, *Reynolds*, 565 U.S. 432 (Ms. Sherry for the United States: "[T]he delegation of authority in (d) is . . . plenary"). Where criminal lawmaking is involved, a general policy statement that leaves on the table the full range of options, from inaction to action, does not suffice.

SORNA leaves to the Attorney General's discretion whether failure to adhere to SORNA's registration requirements is or is not a criminal offense for over half a million people. As Justice Scalia remarked at oral argument in *Reynolds*, "I find it very strange to leave it up to the Attorney General whether something will be a crime or not. . . . I mean, especially leave it up to the Attorney General, for Pete's sake; he's the prosecutor." Oral Arg. Tr. 8:4-9, *Reynolds*, 565 U.S. 432; *see also id.* at 6:10-22 (Ginsburg, J.) (noting that a scheme in which "whether it's a criminal offense or not is up to the Attorney General" is "quite different" from one in which he will "implement the technical details").

The wholesale delegation of authority to a single officer to both decide whether a criminal law applies, without any guidance, and to decide whether to prosecute violations of that law, raises the sharpest separation-of-powers and liberty concerns. SORNA violates the heightened requirements the nondelegation doctrine demands in the criminal setting.

CONCLUSION

For the above reasons, the Court should hold that SORNA violates nondelegation principles.

Respectfully submitted,

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